PUBLIC VERSION

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February 2, 2018

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *In re Altice USA, Inc. Request for Review of Decision of the Universal Service Administrator*, WC Docket Nos. 10-90 and 06-122

Dear Ms. Dortch:

On behalf of Altice USA, Inc. ("Altice"), enclosed for filing in the above-referenced dockets is a Request for Review of Decision of the Universal Service Administrator. In its request, Altice seeks review of the first finding in the January 13, 2017 USAC Internal Audit Division Report on the Audit of Cablevision Lightpath NJ, LLC – 2014 FCC Form 499-A Rules of Compliance. Specifically, Altice seeks reversal of the Universal Service Administrative Company's ("USAC's") reclassification of revenues from certain geographically intrastate private line services as interstate, rather than intrastate.

Some of the submitted data contains material that is sensitive from a commercial, competitive and financial perspective, and that Altice would not reveal to the public, to its competitors or to other third parties in the normal course of business. Altice therefore respectfully requests that, pursuant to Section 0.457 and 0.459 of the Federal Communications Commission's ("Commission's" or "FCC's") rules,[1] the Commission withhold from public inspection and afford confidential treatment to the attached material ("Confidential Information"), as outlined below.

Section 552(b)(4) of the Freedom of Information Act ("FOIA Exemption 4") permits an agency to withhold from public disclosure any information that qualifies as "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[2] Section 0.457(d)(2) of the Commission's rules allows persons to file a request for non-disclosure when submitting materials that they withheld from public inspection.[3] In addition, because this

[1] 47 C.F.R. §§ 0.457, 0.459.

[2] 5 U.S.C. § 552(b)(4).

[3] 47 C.F.R. § 0.457(d)(2).

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is a voluntary submission, if the Commission denies this request for confidential treatment, Altice requests for its Confidential Information to be returned.

In accordance with Section 0.459 of the Commission's rules,[4] Altice submits the following:

1. Identification of the Specific Information for Which Confidential Treatment Is Sought:

Altice seeks confidential treatment of the attached Performance Audit on Compliance with Federal Universal Service Fund Contributor Rules ("Final Performance Audit"), Altice's appeal and supplemental appeal of same, USAC's denial of Altice's appeal, and the draft Other Matter, drafted Detailed Audit Findings, Audit Adjustments by 499-A Line, draft Summary of Monetary Findings and Effect—collectively, the "Confidential Materials"—and all information contained within these documents cited as evidence in the Request for Review.

2. Description of the Circumstances Giving Rise to the Submission:

Altice is submitting the Confidential Materials, which are confidential and contain company-specific revenue information. As noted in the Final Performance Audit, the documents are intended solely for the use of USAC, Altice, and the FCC. The enclosed revenue information is not disclosed publicly and could be detrimental to Altice if it were made public.

3. Explanation of the Degree to Which the Information Is Commercial or Financial, or Contains a Trade Secret or Is Privileged:

The Confidential Information contains sensitive information about Altice's revenues, and is thus protected from disclosure. This information constitutes highly sensitive commercial information "which would customarily be guarded from competitors."[5] The Commission has recognized that, for purposes of Exemption 4, "records are 'commercial' as long as the submitter has a commercial interest in them."[6] In this regard, the Confidential Materials which describe the compliance of Altice in completing its 2014 Telecommunications Reporting Worksheet FCC Form 499-A and assessing federal Universal Service Fund ("USF") recovery charges to customers, contain sensitive financial information that constitutes commercial information which may be withheld under FOIA Exemption 4.

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[4] 47 C.F.R. § 0.459(b).

[5] 47 C.F.R. § 0.457.

[6] *Robert J. Butler*, Memorandum Opinion and Order, 6 FCC Rcd 5414 ¶ 12 (1991) (citing *Pub. Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983); *Am. Airlines v. Nat'l Mediation Bd.*, 588 F.2d 863, 868 (2d Cir. 1978)).

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4. Explanation of the Degree to Which the Information Concerns a Service that Is Subject to Competition:

Altice's submission contains proprietary and non-public information about Altice's financial operations that, if publicly disclosed, could put Altice at a competitive disadvantage with regard to other competitors operating in the same space.

5. Explanation of How Disclosure of the Information Could Result in Substantial Competitive Harm:

Providing competitors and the public with the information contained in Altice's submission would expose business information not ordinarily available to the public. The D.C. Circuit has found parties do not have to "show actual competitive harm" to justify confidential treatment.[7] Rather, "[a]ctual competition and the likelihood of substantial competitive injury' is sufficient to bring commercial information within the realm of confidentiality."[8]

6. Identification of Any Measures Taken to Prevent Unauthorized Disclosure:

The Confidential Information is not publicly available. The Confidential Materials are intended solely for the use of USAC, Altice, and the FCC, and their distribution is limited pursuant to the requirements of 47 C.F.R. § 54.711(b). Furthermore, Altice has never publicly disclosed its revenues, and treats this information as confidential.

7. Identification of Whether the Information Is Available to the Public and the Extent of Any Previous Disclosure of the Information to Third Parties:

Altice has not made the Confidential Information available to the public.

8. Justification of the Period during Which the Submitting Party Asserts That Material Should Not Be Available for Public Disclosure:

Given the highly proprietary and non-public nature of the information in the Submissions, Altice does not foresee a date after which it would no longer consider this information to be highly confidential, and requests that confidential treatment apply indefinitely.

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[7] *Pub. Citizen Health Research Grp.*, 704 F.2d at 1291 (quoting *Gulf & Western Indus. v. U.S.*, 615 F.2d 527, 530 (D.C. Cir. 1979)).

[8] *Id.*

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9. Any Other Information That the Party Seeking Confidential Treatment Believes May Be Useful in Assessing Whether Its Request for Confidentiality Should Be Granted:

The Confidential Materials that Altice is submitting qualify for Exemption 4 of the Freedom of Information Act. Exemption 4 protects information that is (i) commercial or financial; (ii) obtained by a person outside of the government; and (iii) privileged or confidential.[9]

Please contact me if you have any questions regarding these matters.

Sincerely,

/s/ Rebekah P. Goodheart

Rebekah P. Goodheart
Counsel to Altice USA, Inc.

[9] 5 U.S.C. § 552(b)(4).

REDACTED – FOR PUBLIC INSPECTION

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
Altice USA, Inc.	)	
Request for Review	)	WC Docket No. 10-90
of Decision of the Universal Service	)	
Administrator	)	WC Docket No. 06-122
	)	

REQUEST FOR REVIEW OF DECISION OF THE UNIVERSAL SERVICE ADMINISTRATOR

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February 2, 2018

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Administrator	)	WC Docket No. 06-122
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REQUEST FOR REVIEW OF DECISION OF THE UNIVERSAL SERVICE ADMINISTRATOR

I. Statement of Issues and Interest

Altice USA, Inc. ("Altice")[1] respectfully submits this request under Sections 54.719(b), 54.721, and 54.722 of the rules of the Federal Communications Commission (the "Commission"),[2] for the Commission to reverse a finding in Audit No. CR2015CP001 (the "Audit") issued by the Universal Service Administration Company ("USAC") to Cablevision Lightpath NJ, LLC, an Altice subsidiary, on January 13, 2017.[3] Specifically, Altice seeks reversal of USAC's decision to reclassify revenues from certain geographically intrastate private line services as interstate, rather than intrastate, increasing Altice's universal service fund

[1] On June 21, 2016, Altice N.V. acquired Cablevision Systems Corporation ("Cablevision"). Since that time, Altice USA has been the intermediate parent company of Cablevision's operating subsidiaries, including Cablevision Lightpath NJ, LLC. On January 8, 2018, Altice announced a spin-off of Altice USA from Altice N.V.'s control. For simplicity, except where necessary, Cablevision Lightpath NJ, LLC, Cablevision, and Altice are collectively referred to herein as "Altice."

[2] *See* 47 C.F.R. §§ 54.719(b), 54.721, 54.722.

[3] The final audit report is attached herewith as Exhibit A (USAC Internal Audit Division Report on the Audit of Cablevision Lightpath NJ, LLC – 2014 FCC Form 499-A Rules of Compliance (USAC Audit No. CR2015CP001) (January 13, 2017) (the "Audit")).

("USF") contribution base by **[[BEGIN CONFIDENTIAL INFORMATION::** [redacted] **::END CONFIDENTIAL INFORMATION]]**.

This reclassification of revenue was inconsistent with past Commission precedent, the Administrative Procedure Act ("APA"), and principles of fundamental fairness. On March 14, 2017, Altice submitted a letter appeal presenting these concerns and requesting that USAC reverse its decision;[4] with the consent of USAC, Altice supplemented this letter appeal on May 19, 2017[5] to address the Wireline Competition Bureau's (the "Bureau's") intervening March 30, 2017 *Private Line Order*.[6] On December 5, 2017, USAC denied Altice's appeal.[7]

In the Audit, USAC applied the Commission's "Ten Percent Rule" in a manner inconsistent with well-established Commission precedent. Specifically, USAC effectively interpreted the Rule to establish that geographically *intra*state private lines are presumptively *inter*state and, relatedly, to require carriers and their customers to furnish evidence to establish the appropriate jurisdictional allocation for private line revenue. In the past, the Commission has made clear that the only evidence necessary to determine the jurisdictional allocation of private line revenue is a certification (to establish that the private line traffic is interstate), or the absence of a certification (to establish that the private line traffic is intrastate). USAC's application of the

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[4] The original appeal is attached herewith as Exhibit B (Letter from Leah Tulin, Counsel for Cablevision, Jenner & Block LLP, to USAC (Mar. 14, 2017)).

[5] The supplement is attached herewith as Exhibit C (Letter from Leah Tulin, Counsel for Cablevision, Jenner & Block LLP, to USAC (May 19, 2017)).

[6] *In re Federal-State Joint Board on Universal Service to the Board of Directors of the National Exchange Carrier Association, Inc. Universal Service Contribution Methodology*, Order, 32 FCC Rcd 2140 (WCB 2017) ("*Private Line Order*").

[7] The denial is attached herewith as Exhibit D (Letter from USAC to Rebekah Goodheart, Jenner & Block LLP (Dec. 5, 2017)).

Rule was thus incorrect on the merits and, separately, violated the prohibition against USAC's resolving ambiguities in the Commission's rules.[8]

In denying Altice's appeal, USAC compounded this error by inappropriately relying on, and retroactively applying, the Bureau's post-Audit *Private Line Order*, which (1) offered a substantively new interpretation of the Ten Percent Rule for determining the jurisdictional nature of revenues associated with private line service, and (2) created new burdens of proof and evidentiary standards for carriers[9]—standards and evidentiary burdens that did not exist when carriers previously enrolled these intrastate services. Altice requests, at minimum, that the Commission direct that USAC cannot apply the *Private Line Order*'s new standards and requirements retroactively to this years-old Audit. Any such application would unfairly prejudice Altice, who had no reason to gather, let alone retain, evidence it had no reason to think it would ever need.

In short: The findings in the instant Audit regarding the Ten Percent Rule are unlawful and unfair, and the denial of Altice's appeal compounded these errors. The Commission thus should reverse the Audit's first finding.

II. Background

A. The Ten Percent Rule

As the Bureau recently recounted in the *Private Line Order*:

> The Commission established a method for determining the proper allocation of mixed-use private or WATS line costs for purposes of jurisdictional separation almost thirty years ago. In the *Ten Percent Rule Order*, the Commission adopted the recommendation of the Federal-State Joint Board of Separations (Separations Joint Board [or the Board]) that the costs of mixed-use private or WATS lines be directly assigned to the intrastate jurisdiction when

[8] 47 C.F.R. § 54.702(c).

[9] *See Private Line Order*, 32 FCC Rcd at 2444-45 ¶ 11; *id.* at 2148-50 ¶¶ 22-30.

> interstate traffic amounts to ten percent or less of total traffic on the line, and to the interstate jurisdiction when interstate traffic exceeds ten percent.[10]

Prior to the adoption of the Ten Percent Rule "the cost of special access lines carrying both state and interstate traffic [was] generally assigned to the interstate jurisdiction."[11] According to the Federal-State Joint Board on Jurisdictional Separations ("Joint Board"), this approach was problematic in that it "tended to deprive state regulators of authority over largely intrastate private line systems carrying only small amounts of interstate traffic."[12] The Joint Board thus recommended that the Commission adopt a separations mechanism for private lines—whereby a carrier's customer evidences that physically *intra*state lines were jurisdictionally *inter*state "through customer certification[s] that each special access line carries *more than a de minimis amount of interstate traffic*."[13] The Commission adopted this recommendation, as well as the reasoning underlying it, highlighting the "administrative benefits" of a rule that relied on certifications by customers to establish "each of their special access lines" that "carries more than a de minimis amount of interstate traffic."[14]

Since the Commission's adoption of the *Ten Percent Rule Order* in 1989, the Commission has, on multiple occasions, confirmed that the Ten Percent Rule relies on customer certifications to establish the *interstate* jurisdiction of a dedicated circuit that is geographically located within a state—*i.e.*, a circuit that is otherwise presumptively intrastate. In 1995, for

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[10] *See id.* at 2141 ¶ 3 (footnote omitted).

[11] *In re MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Recommended Decision and Order, 4 FCC Rcd 1352, 1352 ¶ 1 (Fed.-State Joint Bd.1989) ("*Ten Percent Rule Proposal*").

[12] *Id.*

[13] *Id.* at 1357 ¶ 32 (emphases added).

[14] *In re MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Decision and Order, 4 FCC Rcd 5660, 5660 ¶¶ 3, 6 (1989) ("*Ten Percent Rule Order*").

instance, the Commission summarized its rule regarding the jurisdiction of mixed-use private lines as follows: "[A] subscriber line is deemed to be interstate . . . if the customer certifies that ten percent or more of the calling on that line is interstate."[15] In 1998, the Commission applied the Ten Percent Rule to GTE's DSL line to conclude that its services were interstate, relying on the finding that "GTE will ask every ADSL customer to certify that ten percent or more of its traffic is interstate."[16] And in 2001, the Commission reaffirmed its use of the Ten Percent Rule, noting that under the Rule, "mixed-use special access lines" are treated as interstate "if the customer certifies that more than 10 percent of the traffic on those lines consists of interstate calls."[17]

This unbroken doctrine establishes two clear principles: (1) Revenues associated with geographically intrastate private lines are presumptively jurisdictionally intrastate; and (2) this presumption can be overcome by a customer certification that more than ten percent of the traffic on a particular private line is jurisdictionally interstate. Far from expecting either carriers or customers to provide further evidence or documentation one way or the other, the Commission consistently has heralded this simple approach as promoting administrative efficiency.[18]

B. Audit No. CR2015CP001

Cablevision Lightpath NJ, LLC is a competitive access provider and competitive local exchange carrier that provides facilities-based local exchange and interexchange services in New

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[15] *In re Petition for an Expedited Declaratory Ruling Filed by National Association for Information Services, Audio Communications, Inc., and Ryder Communications, Inc.*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 4153, 4161 ¶ 17 (1995).

[16] *In re GTE Telephone Operating Cos., GTOS Tariff No. 1, GTOC Transmittal No. 1148*, Memorandum Opinion and Order, 13 FCC Rcd 22,466, 22,481 ¶ 27 n.95 (1998).

[17] *In re MTS and WATS Market Structure,* Order, 16 FCC Rcd 11,167, 11,617 ¶ 2 (2001).

[18] *Accord In re Request for Review by Puerto Rico Telephone Co., Inc. of Decision of the Universal Service Administrator*, WC Docket No. 08-71, Puerto Rico Telephone Co., Inc.'s Request for Review of Decision of the Universal Service Administrator 8-10 (June 25, 2012) (describing legal and regulatory history of Ten Percent Rule).

Jersey. As required by the Communications Act of 1934, as amended, and the Commission's rules, Cablevision Lightpath NJ, LLC files an annual report (Form 499-A) on its service revenues. USAC uses such revenue reports to calculate and assess regulatory fees on providers, including to support the federal universal service fund. Consistent with past Commission practice, in its 2014 Form 499-A, reporting revenue for calendar year 2013, Cablevision Lightpath NJ LLC classified revenue associated with geographically intrastate private lines, for which there were no customer certifications establishing that ten percent or more of the traffic was interstate, as intrastate.

In August 2016, USAC's Internal Audit Division ("IAD") released an audit report providing **[[BEGIN CONFIDENTIAL INFORMATION::** [redacted] **::END CONFIDENTIAL INFORMATION]]** regarding Cablevision Lightpath NJ, LLC's 2014 Form 499-A.[19] IAD's first finding is the subject of the instant request—*viz.*, that Altice failed to provide documentation sufficient to support its classification of this private line revenue as intrastate, and that, accordingly, revenue from these circuits should be reclassified as interstate.

During the audit process, Altice objected to IAD's approach to the revenue associated with these circuits on two grounds. First, Altice objected to IAD's conclusion that Altice's evidence, which showed that the audited circuits were each located entirely within a given state, was insufficient to support its classification of these lines as intrastate. Second, Altice objected to IAD's presumption that revenues from geographically intrastate private line service are to be treated as interstate absent proof from a carrier to the contrary. IAD rejected these arguments,

[19] The IAD report is attached herewith as Exhibit E (Performance Audit on Compliance with Federal Universal Service Fund Contributor Rules, USAC Audit No. CR2015CP001 (Aug. 18, 2016)).

however, and reclassified the revenue as interstate. On January 13, 2017, USAC released a final audit report adopting IAD's flawed first finding. Altice appealed on March 14, 2017. On March 30, 2017, the Commission issued its *Private Line Order*. In response, Altice contacted USAC, requesting permission to supplement its appeal, which Altice did on May 19, 2017. On December 5, 2017, USAC denied Altice's appeal.

III. Discussion

Upon request, the Commission must conduct a *de novo* review of USAC decisions.[20] Further, as the Commission has noted repeatedly, USAC is authorized to act only as an administrator of the USF program; it may not "make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress."[21] Notwithstanding the Bureau's subsequent decision in the *Private Line Order*, USAC's decision in Audit No. CR2015CP001 runs afoul of each of these prohibitions. Further, USAC's decision in the initial Audit and retroactive application of the Bureau's problematic *Private Line Order* to deny Altice's appeal, is inconsistent with Commission precedent, violates the APA, and is fundamentally unfair and unsound public policy.

First, USAC's application of the Ten Percent Rule is contrary to the Rule's purpose and Commission precedent, which support a presumption that geographically intrastate, mixed-use private lines should be treated as intrastate *unless* a customer certifies that ten percent or more of the line's traffic is interstate. As the Joint Board explained in recommending that the Commission adopt the Ten Percent Rule in the first instance, this rule was intended to effect a change to the *status quo*, which had "generally assigned" mixed-use private lines to the interstate

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[20] 47 C.F.R. § 54.723.

[21] *Id.* § 54.702(c).

jurisdiction and thus had "tended to deprive state regulators of authority over largely intrastate private line systems carrying only small amounts of interstate traffic."[22] Importantly, the Commission adopted both the Joint Board's recommendation *and its reasoning*,[23] and consistently has reaffirmed that private lines should be classified as interstate only if a customer certifies that more than ten percent of the traffic on those lines is interstate.[24] In the instant Audit, USAC construed the Ten Percent Rule to have precisely the opposite effect, requiring carriers to provide documentary evidence to support classification of revenues as intrastate, increasing the administrative burden on carriers and USAC alike, and depriving state regulators of jurisdiction over truly intrastate line services.

Second, even if the Ten Percent Rule was unclear when USAC issued the Audit (which *preceded* the Bureau's *Private Line Order*), USAC lacked the legal authority unilaterally to resolve any lack of clarity on its own. As noted, the Commission's rules expressly forbid USAC from making policy or interpreting unclear provisions of the statute or rules. Altice, of course, maintains that the Ten Percent Rule is not, and never has been, ambiguous; to the contrary: it expressly forecloses USAC's decision. Nevertheless, the mere fact that multiple experienced carriers all construed the Rule, in light of its history and purpose, in the same manner, and that USAC construed the Rule to mean the exact opposite indicates that, at the time of the Audit, the Rule *was at least ambiguous* as to whether it required carriers to furnish evidence of the intrastate jurisdictional nature of private line services. That ambiguity renders the private-line finding in Audit No. CR2015CP001 unlawful.

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[22] *Ten Percent Rule Proposal*, 4 FCC Rcd at 1352 ¶ 1.

[23] *See Ten Percent Rule Order*, 4 FCC Rcd at 5660 ¶¶ 3, 6.

[24] *See supra notes* 15-17 and accompanying text.

Nor does the post-Audit *Private Line Order* somehow prevent the Audit from violating the prohibition against USAC's resolving ambiguities in the Commission's rules. Even assuming the *Private Line Order* was right on the merits, which Altice disputes,[25] at most, it purports to demonstrate that the Ten Percent Rule did not create a presumption that private lines are intrastate in nature.[26] The *Private Line Order* does not, however, address whether the Rule *reasonably could have been construed to create such a presumption.* Because the rule could have been so construed—and indeed was so construed by numerous carriers—USAC separately violated the Commission's rules by resolving that ambiguity, irrespective of whether the Bureau subsequently found similar actions by USAC vis-à-vis other carriers reasonable.

Third, even if the Commission were to accept USAC's interpretation of the Ten Percent Rule, consistent with the APA, the Rule could only be modified after notice and comment.[27] Further, if the Commission elects to pursue this approach, it would be impermissible to apply these standards retroactively to Altice for services provided in 2013. The APA generally requires that new rules be given their "future effect" only.[28] Retroactive substantive rules—*i.e.*, rules that "impair rights a party possessed when he [or she] acted, increase a party's liability for

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[25] In this respect, Altice supports the pending applications of review of the *Private Line Order*. Altice hereby fully incorporates the arguments contained therein by reference. *See, e.g.*, *In re Federal-State Joint Board on Universal Service*, Application by TDS Metrocom, LLC for Review or Clarification or in the Alternative, Request for Waiver, CC Docket No. 96-45 (May 1, 2017); *In re Application for Review by XO Communications Services, LLC of Decision of the Wireline Competition Bureau*, XO Communications Services, LLC Application for Review of Decision of the Wireline Competition Bureau, CC Docket No. 96-45 (May 1, 2017) ("*XO Application*").

[26] *See Private Line Order*, 32 FCC Rcd at 2144-48 ¶¶ 11-21.

[27] *See* 5 U.S.C. §§ 552(a), 553.

[28] *Id.* § 551(4); *see also Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009) (highlighting the APA's "requirement that legislative rules . . . be given future effect only" (internal quotation marks omitted) (alteration in original)); *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001).

past conduct, or impose new duties with respect to transactions already completed"—are prohibited.[29]

USAC's action falls squarely into the last category: it imposes new duties with respect to transactions that were completed over four years ago. While the Commission may apply minor "clarifications[] and additions" from adjudications retroactively, it may not do so to "alter[] an established rule defining permissible conduct which has been generally recognized and relied on throughout the [regulated] industry" or to "substitute new law for old law that was reasonably clear."[30] As recounted above, the Commission's application of the Ten Percent Rule was clear to the industry until USAC's departure from that approach. That is evident not only from the Commission's consistent application of the Ten Percent Rule,[31] but also from the very fact that multiple experienced carriers are currently litigating this issue, because they all allocated revenue as intrastate following the same approach that Altice did.[32] USAC's unlawful disregard for Commission precedent cannot create the antecedent uncertainty that would permit retroactive application of the *Private Line Order* (whatever that Order's merits).

Alternatively, requiring Altice to provide customer certifications for private line services it provided in 2013 would be manifestly unjust, which is a separate basis for prohibiting retroactive application of the *Private Line Order* to the instant audit.[33] The fact that carriers are required to retain, for at least five years from the date of a contribution, "all records that may be

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[29] *Landgraf v. USI Film Prods.*, 511 U.S. 224, 280 (1994).

[30] *AT&T v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006) (brackets, ellipsis, and quotation marks omitted).

[31] *See supra notes* 15-17 and accompanying text.

[32] *See Private Line Order*, 32 FCC Rcd at 2141 ¶ 1 n.2 (recounting number of similar USAC audits consolidated for review by Bureau).

[33] *See AT&T*, 454 F.3d at 332; *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001).

required to demonstrate to auditors that the contributions made were in compliance with" Commission rules, including historical customer records and any other relevant documentation,[34] is a red herring. Because, under longstanding Commission precedent, carriers were not required to furnish *any* evidence to establish the intrastate nature of private lines for which there was no customer certification indicating above-threshold interstate use, the "records" that carriers should have retained in connection with these revenues for the five-year retention period are a null set.[35] The Commission has not hesitated to rein in similar retroactive actions by USAC in the past.[36]

Fourth, USAC's novel application of the Ten Percent Rule is not in the public interest for several independent reasons. The presumption that all private line traffic is interstate unless a provider offers proof to the contrary would lead to excessive allocation of mixed-use private lines to the interstate jurisdiction, thus "depriv[ing] state regulators of authority over largely intrastate private line systems carrying only small amounts of interstate traffic."[37] Indeed, USAC's interpretation could result in significant revenue being transferred away from state governments to the federal government. The state and federal government should work in partnership to promote universal service and such decision could decrease potential funding for state universal service funds and may also have implications for state and local taxes—at a time

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[34] *Private Line Order*, 32 FCC Rcd at 2149-50 ¶ 29 (quotation marks omitted).

[35] *See id.*

[36] *See Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, Order, 23 FCC Rcd 10,731, 10,734 ¶ 8 (2008) (determining that it would be unfair retroactively to apply a USAC decision requiring a stand-alone conferencing provider to contribute to the universal service fund, because it was previously unclear whether the provider was required to contribute), *aff'd, Conference Grp., LLC v. FCC*, 720 F.3d 957 (D.C. Cir. 2013); *In re Universal Service Contribution Methodology*, Order, 27 FCC Rcd 13,780, 13,798 ¶ 41 (2012) (giving only prospective effect to new contribution-related certification procedures for resellers to allow carriers time to "make changes to their internal policies and procedures, as well as to their existing contracts, to ensure compliance with the Commission's reseller requirements as clarified in this order"), *review dismissed, Global Crossing Telecomms., Inc. v. FCC*, 605 F. App'x 4 (D.C. Cir. 2015).

[37] *Ten Percent Rule Proposal*, 4 FCC Rcd at 1352 ¶ 1.

when state budgets are already strained.[38] Such result is not consistent with the Joint Board's decision nor is it fair to states. The retroactive application of this interpretation would compound the problem.

Separately, USAC's interpretation of the Ten Percent Rule in this case casts doubt on the sufficiency of certifications to establish either the interstate or intrastate nature of traffic on private lines. If affirmed, this approach would increase complexities and administrative burdens on providers and USAC alike. Indeed, providers often lack the ability to monitor customers' use of circuits, including customer connections that may be made to other services or service providers.[39] Thus, while the Board proposed the Ten Percent Rule to promote administrative simplicity and economic efficiency—and proposed relying on certifications as a "uniform, nationwide verification system for separations purposes" except in "carefully circumscribed" situations where carriers would look beyond the presence or absence of a certification[40]—the USAC approach would force carriers to divert resources from innovation and service to extraneous monitoring and record keeping to be able to substantiate the nature of traffic on private lines, whereas before, carriers had no reason to validate customer certifications.

Relatedly, in its attempt to rewrite the evidentiary standards for the Ten Percent Rule, USAC relies on the Bureau's *Private Line Order*, which advised that carriers "should provide basic guidance to their customers regarding what constitutes intrastate or interstate traffic."[41]

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[38] *See id.* at 1355 ¶ 17 (recounting record evidence that "interstate assignment of mixed use lines unjustifiably deprives the states of revenues that could be used to support local exchange rates"); *see also, e.g.*, 47 C.F.R. § 36.1(a) (explaining that separations are applicable to "property costs, revenues, expenses, taxes, and reserves as recorded on the books of the company or to estimated amounts").

[39] *See* XO Application at 4-5.

[40] *Ten Percent Rule Proposal*, 4 FCC Rcd at 1357 ¶ 32; *id.* at 1358 ¶ 35.

[41] *Private Line Order*, 32 FCC Rcd at 2148 ¶ 25.

This requirement will impose a new burden and unnecessary education costs on carriers, which are unlikely to be recouped (and thus will necessarily trade-off with other, more productive purposes).

This instruction is separately problematic given the Bureau's further instruction that, going forward, auditors should consider "customer certifications . . . indicat[ing] whether, to the customer's understanding, more than ten percent of the traffic on its private line is interstate *or, alternatively, ten percent or less of the traffic is interstate*."[42] The Bureau appears to be establishing a new requirement and burden, *sub silentio*, that on a going forward basis, all carriers should obtain certifications from customers for *all* private lines as routine practice. But the Commission did not undertake any Paperwork Reduction Act ("PRA") analysis or approval process for this additional burden associated with the collection of further certifications in connection with Form 499-A.[43] OMB has not been able to evaluate the burden of such additional information and ensure it complies with the PRA. Hence, drawing adverse conclusions from carriers' failing to provide such certifications is unlawful.[44]

Relatedly, customers may fail to return certifications for any number of reasons, including inadvertent omission, lack of knowledge of the actual Ten Percent Rule as written,

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[42] *Id.* (emphasis added).

[43] The Paperwork Reduction Act of 1995 requires the Commission to obtain Office of Management and Budget ("OMB") approval prior to conducting or sponsoring information collections. 44 U.S.C. § 3507. The Commission last obtained PRA approval for the Form 499-A in 2001—well before the Bureau adopted the new burden. It submitted documents requesting approval for non-substantive changes to the Form 499-A on January 18, 2018, but its request did not contemplate any changes related to certifications in connection with the Ten Percent Rule. *See* Justification for Non-Substantive Change Request, OMB Control No. 3060-0855.

[44] 44 U.S.C. § 3512. While USAC may request additional documents in connection with any individual audit without engaging in a PRA analysis, 44 U.S.C. § 3518(c)(1)(B)(ii); *MacKenzie Med. Supply, Inc. v. Leavitt*, 506 F.3d 341, 350 (4th Cir. 2007), that exception does not apply to the Bureau's categorical "guidance" as to the evidence that carriers should submit going forward. *Private Line Order*, 32 FCC Rcd at 2148 ¶¶ 23-25.

misunderstanding of the request, or misunderstanding of the circuit technology.[45] They also may discontinue service, move, or be otherwise unreachable—notwithstanding the good-faith efforts of carriers. In such scenarios, it would be patently unfair to draw "adverse inferences" from the carriers' lack of documentation.[46]

IV. Conclusion

For the foregoing reasons, Altice requests that the Commission reverse the USAC decision approving the final Audit finding that Altice misreported the revenues from certain geographically intrastate private lines on its 2014 Form 499-A.

Respectfully submitted,

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February 2, 2018

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[45] *See In re Request for Review of PaeTec Communications Inc. of Universal Service Administrator Decision*, WC Docket No. 06-122, PaeTec Communications, Inc. Request for Review of Universal Service Administrator Decision 8-9 (Apr. 3, 2012).

[46] *Private Line Order*, 32 FCC Rcd at 2148 ¶ 22.a

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 2018, I caused copies of the foregoing Request for Review by Altice USA, Inc. of the Decision of the Universal Service Administrator to be served as specified below upon the following parties:

Radha Sekar
Chief Executive Officer
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(via First Class Mail)

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Chief, Telecommunications Access Policy Division
Wireline Competition Bureau
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(via Hand-Delivery)

Beth Gulden
Legal Assistant
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REDACTED – FOR PUBLIC INSPECTION

EXHIBIT A – FINAL AUDIT REPORT

[38 pages]

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EXHIBIT B – CORRESPONDENCE BETWEEN ALTICE AND USAC

[5 pages]

REDACTED – FOR PUBLIC INSPECTION

EXHIBIT C – CORRESPONDENCE BETWEEN ALTICE AND USAC

[2 pages]

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EXHIBIT D – CORRESPONDENCE BETWEEN ALTICE AND USAC

[4 pages]

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EXHIBIT E – DRAFT AUDIT FINDINGS

[37 pages]